

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ANTHONY R. BUTLER,)	
)	No. CV-10-3051-CI
Plaintiff,)	
)	ORDER GRANTING DEFENDANT'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND DENYING PLAINTIFF'S
MICHAEL J. ASTRUE,)	MOTION FOR SUMMARY JUDGMENT
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 14, 16.) Attorney D. James Tree represents Anthony R. Butler (Plaintiff); Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on April 17, 2006. (Tr. 90-92, 87-89.) Plaintiff alleges disability due to severe panic attacks, racing thoughts, an inability to concentrate, back pain and depression (Tr. 106, 144), with an alleged onset date of October 31, 2005. (Tr. 87, 90.) His claim was denied initially and

1 on reconsideration. (Tr. 46-49, 55-60.) Plaintiff requested a
2 hearing before an administrative law judge (ALJ), which was held on
3 November 4, 2008, before ALJ Paul Gaughen. (Tr. 61, 63-67.)
4 Plaintiff, represented by counsel, and vocational expert Deborah N.
5 Lapoint testified. (Tr. 21-40.) The ALJ denied benefits on
6 December 18, 2008, and the Appeals Council denied review. (Tr. 10-
7 18, 1-3.) The instant matter is before this court pursuant to 42
8 U.S.C. § 405(g).

9 STATEMENT OF THE CASE

10 The facts of the case are set forth in detail in the transcript
11 of proceedings and are briefly summarized here. At the time of the
12 hearing, Plaintiff testified he was 26 years old with a high-school
13 education. (Tr. 31.) Plaintiff has past work experience as a
14 computer operator, cook, laborer and phone operator. (Tr. 113.)
15 Plaintiff testified he lives with his girlfriend and her daughter in
16 an apartment. (Tr. 33.) Plaintiff testified that an inability to
17 sit or stand for long periods, a need to lie down frequently, and
18 mental issues prevent him from returning to his previous work. (Tr.
19 32-33.)

20 ADMINISTRATIVE DECISION

21 ALJ Gaughen found Plaintiff's date of last insured for DIB
22 purposes was September 30, 2010. (Tr. 12, Finding 1.) At step one,
23 the ALJ found Plaintiff had not engaged in substantial gainful
24 activity since October 31, 2005, the alleged onset date. (*Id.*,
25 Finding 2.) At step two, he found Plaintiff had severe impairments
26 of "an affective/mood disorder and obesity." (Tr. 12, Finding 3.)
27 He concluded Plaintiff's back pain was not severe. (Tr. 14.) The
28 ALJ determined at step three Plaintiff's medically determinable

1 impairments, alone and in combination, did not meet or medically
2 equal one of the listed impairments in 20 C.F.R. Part 404, Subpart
3 P, Appendix 1 (Listings). (Tr. 14, Finding 4.) After step three,
4 the ALJ found Plaintiff "has the residual functional capacity to
5 perform *light* work . . . with nonexertional social functioning
6 limitations for minimal interaction with co-workers, and no work
7 requiring higher level social skills or collaboration with others."
8 (Tr. 15, Finding 5.) The ALJ found Plaintiff's alleged limitations
9 were not credible as to their intensity, persistence and limiting
10 effects to the extent they are incompatible with the ALJ's RFC
11 determination. (Tr. 17.) At step four, the ALJ determined
12 Plaintiff could perform his past relevant work ("PRW") as a computer
13 specialist/operator because "this work does not require the
14 performance of work-related activities precluded by [Plaintiff's]
15 residual functional capacity." (*Id.*, Finding 6.) As a result, the
16 ALJ found Plaintiff "has not been under a disability, as defined in
17 the Social Security Act from October 31, 2005," through December 18,
18 2008, the date of the ALJ's decision. (Tr. 18, Finding 7.)

19 STANDARD OF REVIEW

20 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
21 court set out the standard of review:

22 A district court's order upholding the Commissioner's
23 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
24 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
25 Commissioner may be reversed only if it is not supported
26 by substantial evidence or if it is based on legal error.
27 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
28 Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not

1 substitute its judgment for that of the Commissioner.
2 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

3 The ALJ is responsible for determining credibility,
4 resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
5 Cir. 1995). The ALJ's determinations of law are reviewed
6 *de novo*, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

7 It is the role of the trier of fact, not this court, to resolve
8 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
9 supports more than one rational interpretation, the court may not
10 substitute its judgment for that of the Commissioner. *Tackett*, 180
11 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
12 Nevertheless, a decision supported by substantial evidence will
13 still be set aside if the proper legal standards were not applied in
14 weighing the evidence and making the decision. *Browner v. Secretary*
15 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
16 there is substantial evidence to support the administrative
17 findings, or if there is conflicting evidence that will support a
18 finding of either disability or non-disability, the finding of the
19 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
20 1230 (9th Cir. 1987).

21 SEQUENTIAL EVALUATION PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are
25 "under a disability" are eligible to receive benefits. 42
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
27 medically determinable physical or mental impairment"
28 which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological

1 abnormalities which are demonstrable by medically
2 acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a
3 claimant will be eligible for benefits only if his
4 impairments "are of such severity that he is not only
5 unable to do his previous work but cannot, considering his
6 age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy" 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled. 20
9 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
10 137, 140-42 (1987). In steps one through four, the burden of proof
11 rests upon the claimant to establish a prima facie case of
12 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
13 920, 921 (9th Cir. 1971). This burden is met once a claimant
14 establishes that a medically determinable physical or mental
15 impairment prevents him from engaging in his previous occupation.
16 20 C.F.R. §§ 404.1520(a), 416.920(a). This requires the
17 presentation of "'complete and detailed objective medical reports of
18 [his] condition from licensed medical professionals.'" *Meanel v.*
19 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (quoting *Johnson v.*
20 *Shalala*, 60 F.3d 1428, 1432 (9th Cir. 1995).

21 If a claimant cannot do his PRW, the ALJ proceeds to step five,
22 and the burden shifts to the Commissioner to show that (1) the
23 claimant can make an adjustment to other work; and (2) specific jobs
24 exist in the national economy which claimant can perform. 20 C.F.R.
25 §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d
26 1496, 1497-98 (9th Cir. 1984).

27 ISSUES

28 The question is whether the ALJ's decision is supported by

1 substantial evidence and free of legal error. Plaintiff argues the
2 ALJ erred when he: (1) found Plaintiff not credible; (2) rejected
3 the DSHS evaluation opinions of Plaintiff's treating mental health
4 providers; and (3) failed to conduct a proper step four assessment.
5 (ECF No. 15.) Defendant contends the ALJ's decision is supported by
6 substantial evidence and free of legal error. (ECF No. 17.)

7 DISCUSSION

8 A. Credibility

9 Plaintiff argues the ALJ erred "in failing to provide valid
10 reasons for rejecting the [Plaintiff's] own subjective complaints."
11 (ECF No. 15 at 15.) In making a credibility determination, the ALJ
12 must engage in a two-step process. *Smolen v. Chater*, 80 F.3d 1273,
13 1281 (9th Cir. 1996). First, a claimant must establish the existence
14 of an impairment which can reasonably be expected to cause his
15 alleged pain or limitations. *Cotton v. Bowen*, 799 F.2d 1403, 1407
16 (9th Cir. 1986). Once the existence of an impairment has been
17 established, the ALJ must determine the credibility of the
18 claimant's complaints of pain and limitations. Unless there is
19 affirmative evidence of malingering, the ALJ must provide "clear and
20 convincing" reasons to indicate the ALJ has not arbitrarily rejected
21 a claimant's testimony. *Thomas v. Barnhart*, 278 F.3d 947, 958-59
22 (9th Cir. 2002).

23 When assessing a claimant's credibility, the lack of objective
24 medical evidence is a proper factor to consider along with: a
25 claimant's treatment history; daily activities; work record; a
26 claimant's reputation for truthfulness; inconsistencies in his
27 testimony, or between his testimony and conduct observations of
28 physicians and third parties with personal knowledge of the

1 claimant's symptoms. *Id.*; quoting *Light v. Soc. Sec. Admin.*, 119
2 F.3d 789, 792 (9th Cir. 1997); *Social Security Ruling* ("SSR") 96-7p.¹
3 It is also proper to consider evidence of disability-seeking
4 motivation in evaluation of credibility. *Tidwell v. Apfel*, 161 F.3d
5 599, 602 (9th Cir. 1998). So long as the ALJ's decision to reject
6 a claimant's subjective complaints is based on substantial evidence,
7 the court may not engage in second-guessing. *Thomas*, 278 F.3d at
8 959.

9 Plaintiff argues the ALJ gave only "a vague assertion that the
10 medical evidence does not support his claims." (ECF No. 15 at 16.)
11 Plaintiff's argument is unavailing because the ALJ summarized the
12 Plaintiff's testimony and pointed to particular evidence which
13 undermined the alleged severity of his limitations. (Tr. 15-17.)
14 While finding Plaintiff not credible based solely on a lack of
15 objective medical evidence to support pain or other limitations is
16 not proper, *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1996);
17 *Cotton*, 799 F.2d at 1407, the ALJ gave additional reasons including
18 (1) inconsistent statements to medical providers; (2) specific
19 observations of Plaintiff's treatment providers about inconsistent
20 symptoms; (3) evidence from examining psychiatrist Jay Toews, Ed.D.,
21 who diagnosed Plaintiff with probable disability-seeking motivation,

22
23 ¹ Social Security Rulings are issued to clarify the Regulations
24 and policy. They are not published in the federal register and do
25 not have the force of law. However, under the case law, deference
26 is to be given to the Commissioner's interpretation of the
27 Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005);
28 *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3. (9th Cir. 1991).

1 finding no evidence of either bipolar disorder or schizoaffective
2 disorder; and (4) evidence regarding Plaintiff's activities of daily
3 living. (Tr. 16-17.)

4 To support his finding Plaintiff's alleged limitations were not
5 supported by objective medical evidence, the ALJ relied on
6 information from Plaintiff's treating provider, Peter Harveson, M.D.
7 (Tr. 16.) In June 2007, Dr. Harveson opined Plaintiff was limited
8 to "light work." (Tr. 245.) In July 2007, Plaintiff received an
9 MRI which showed a "3 mm central posterior disc protrusion L5-S1
10 causing mild effacement upon the ventral surface of the thecal sac.
11 Moderate degenerative disc disease L5-S1. No evidence of spinal
12 stenosis or neuroforaminal compromise." (Tr. 255.) After physical
13 therapy, Dr. Harveson noted in June 2008 "[Plaintiff] is actually
14 doing better." (Tr. 357.) He was using a TENS unit with success.
15 (*Id.*) In October 2008, Plaintiff's back was still bothering him,
16 but he noted physical therapy exercises help "when he does them."
17 (Tr. 359.) Importantly, there is no opinion from Dr. Harveson after
18 June 2007, and there is no medical opinion noting Plaintiff's
19 alleged need to lie down frequently. Further, to the extent
20 Plaintiff's back pain causes limitations, this is included in the
21 ALJ's RFC determination which limited Plaintiff to no more than
22 "light" work, as Dr. Harveson suggested. (Tr. 15.) The propriety
23 of the RFC finding is discussed below. In sum, the record supports
24 the ALJ's conclusion that medical evidence does not support
25 Plaintiff's allegations of disabling limitations.

26 In addition to finding Plaintiff's alleged physical limitations
27 were not supported by the objective medical evidence, the ALJ found
28 Plaintiff was not credible due to his inconsistent statements to

1 medical providers regarding his psychiatric history. (Tr. 17.) In
2 March 2006, Plaintiff reported a single suicide attempt as a
3 teenager with no treatment afterwards. (Tr. 178.) In October 2006,
4 Plaintiff reported to Dr. Toews that he had a nervous breakdown as
5 a teen and attempted suicide by carbon monoxide poisoning three
6 times. (Tr. 199.) By contrast, in 2008, he reports a single
7 suicide attempt by carbon monoxide poisoning and an attempted
8 drowning in the Yakima River, both attempts stopped by him with
9 treatment following. (Tr. 277.) As an ALJ may reject a Plaintiff's
10 subjective limitations based on inconsistent statements to medical
11 providers, the ALJ did not err. *Smolen*, 80 F.3d at 1284 (noting
12 "the ALJ may consider . . . ordinary techniques of credibility
13 evaluation, such as . . . prior inconsistent statements")

14 The ALJ also found Plaintiff's credibility was undermined by
15 observations of Plaintiff's medical providers. (Tr. 17.) For
16 example, Plaintiff made complaints of visual, auditory, tactile and
17 olfactory hallucinations. However, Plaintiff's mental health
18 providers have questioned whether he actually suffers from
19 hallucinations. (Tr. 192, 200, 222, 293.) In treatment records, a
20 provider from Central Washington Comprehensive Mental Health (CWCMMH)
21 observed that "[i]t is truly unclear at this time what [Plaintiff's]
22 presentation is reflective of." (Tr. 293.) In January 2007, Lisa
23 Vickers, ARNP noted, "The point was brought up to [Plaintiff] today
24 that his presentation to Kenneth Hails [his case manager] and his
25 presentation to me are somewhat inconsistent." (Tr. 286.) Ms.
26 Vickers also found "[Plaintiff] continues to present with mixed
27 symptomatology as well as incongruence between therapist, case
28

1 manager, and provider." (Tr. 288.)² As inconsistent statements and
2 observations by third parties concerning the nature, severity and
3 effect of symptoms are both proper reasons to reject a claimant's
4 testimony, the ALJ did not err. *Thomas*, 278 F.3d at 958-59.

5 Additionally, the ALJ's negative credibility assessment is
6 supported by evidence of disability-seeking behavior. (Tr. 17.)
7 Dr. Toews evaluated Plaintiff and assessed "[d]isability seeking
8 motivation, probable." (Tr. 197-201.) Dr. Toews found Plaintiff
9 complained of "being depressed and slow" but that "[s]tructured
10 interview technique did not produce information supporting
11 depression, anxiety, ADD, or PTSD." (Tr. 200.) Treatment records
12 from CWCMH state, "He seems very content with staying home and doing
13 nothing." (Tr. 182.) The ALJ also based his negative credibility
14 finding on Plaintiff's reported activities of daily living. (Tr.
15 16.) In reports to evaluating and treating sources, Plaintiff
16 reported "a full complement of independent living skills," getting
17 along with neighbors, adjusting well in a move from Utah to Yakima,
18 and having friends. (Tr. 180, 199.) He also reported he enjoyed
19 going to the park or out to eat with friends. (Tr. 199.) Because
20 the ALJ properly considered objective medical evidence as a factor
21 in his credibility determination and gave additional proper reasons
22 for finding Plaintiff not credible, all supported by substantial
23

24 ² As to Ms. Vickers' observation, reviewing provider Mary
25 Gentile, Ph.D., stated Plaintiff's "[c]onflicting symptomatology"
26 noted in recent psych[iatric] eval[uation] is best explained by
27 [claimant] feigning psychological problems to secure funds to stay
28 home and do nothing/play videogames." (Tr. 204.)

1 record evidence, the ALJ did not err. *Burch*, 400 F.3d at 680-81.

2 **B. Medical Opinion Evidence**

3 Plaintiff argues the ALJ erred in rejecting the DSHS
4 evaluations of his treating mental health counselors. (ECF No. 15
5 at 9.) The regulations distinguish between opinions given by
6 "acceptable medical sources" and "other sources." 20 C.F.R.
7 §§ 404.1513, 416.913. "Acceptable medical sources" include
8 "licensed physicians" and "licensed or certified psychologists." 20
9 C.F.R. §§ 404.1513(a)(1), (2); 404.913(a)(1), (2). "Other sources"
10 include nurse practitioners, physicians' assistants, therapists,
11 teachers, social workers, spouses and other non-medical sources. 20
12 C.F.R. §§ 404.1513(d), 416.913(d). The opinion of an "acceptable
13 medical source" is given more weight than the opinion of an "other
14 source," 20 C.F.R. §§ 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d
15 967, 970-71 (9th Cir. 1996), except where the factors of 20 C.F.R.
16 §§ 404.1527(d), 416.927(d) lead to a determination the "other
17 source" should be given greater weight than an "acceptable medical
18 source." SSR 06-3p. The ALJ is required to "consider observations
19 by non-medical sources as to how an impairment affects a claimant's
20 ability to work." *Sprague v. Bowen*, 812 F.2d 1226, 1231-32 (9th Cir.
21 1987). Pursuant to *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir.
22 1993), to reject the opinion of an "other source," the ALJ must give
23 reasons "germane" to "other source" testimony.

24 Here, the ALJ explained his reasons to reject the DSHS
25 evaluations:

26 The evidence also includes a number of Department of
27 Social and Health (DSHS) pre-printed psychological
28 evaluation assessment forms indicating that the claimant
had numerous "moderate" and "marked" cognitive and social
limitations. (Exhibits 2F; 11F; 12F; 14F; 18F) They are

1 rejected for numerous obvious reasons. First and
2 foremost, they are not supported by any evidence. By his
3 own admission, his treatment has been exceptionally
4 limited, more specifically, limited to medication only.
5 Therefore, these pre-printed check-mark limitation
6 indications appeared to be based solely on the claimant's
7 reported complaints as there is no objective or even
8 clinical evidence supporting these severity rating
9 indications. In fact, on the most recent July 2008 one,
10 it was specifically indicated that the severity degree was
11 "by self report". It can also be noted that DSHS
12 evaluations are known to be lenient, and for the primary
13 purpose of temporarily continuing claimants' assistance
14 benefits.

15 (Tr. 16.)

16 This reasoning shows the ALJ rejected Plaintiff's DSHS
17 evaluations because (1) they are not supported by any evidence, (2)
18 they are based on Plaintiff's properly rejected subjective
19 complaints, and (3) DSHS evaluations are known to be lenient and
20 therefore entitled to less weight. Defendant concedes the last
21 reason offered is improper, but Defendant argues the remaining
22 reasons are both proper and supported by substantial evidence. (ECF
23 No. 17 at 10.) In addition to arguing the ALJ's assertion as to
24 "known leniency" of DSHS evaluations is improper as Defendant
25 concedes, Plaintiff argues this assertion tainted his evaluation of
26 the DSHS reports and made it impossible for the court or the
27 Plaintiff to know the weight these reports would have been given
28 without that belief. (ECF No. 15 at 15; ECF No. 18 at 3.)
Plaintiff also argues the ALJ's rejection of the DSHS evaluations is
erroneous because the ALJ did not afford them the "great deference"
due opinions from treating sources. (ECF No. 15 at 9.)

As to Plaintiff's argument the ALJ's assertion as to "known
leniency" tainted his evaluation of the DSHS evaluations, this
argument fails. The ALJ actually accepted one DSHS evaluation (Tr.

17) which shows the ALJ's assertion did not interfere with his review of the DSHS opinions. Even though one reason supplied is not proper, the ALJ's finding will be upheld if substantial evidence supports the remaining reasons. *Turner v. Comm'r Soc. Sec.*, 613 F.3d 1217, 1224 (9th Cir. 2010).

As to the evidence supporting the rejection of Plaintiff's DSHS evaluations, the ALJ found that the evaluations were not supported by objective findings. (Tr. 16.) In the May 2006 evaluation, Christopher Clark, LMHC, states treatment results to date were based on Plaintiff "attend[ing] assessment on [a] walk-in basis." (Tr. 173.) Similarly, the May 2007 report from Paul Harman, MSW concluded Plaintiff has bipolar disorder "by history" and noted "[Plaintiff] reports distress when he is around others and reports having anxiety attacks. His reported symptoms are inconsistent with reported attacks." (Tr. 238-39.) Further, in her July 2008 report, Kathleen Schormann, MHP, also notes her findings are based on Plaintiff's self-report. (Tr. 257.) None of the reports include either results of objective testing provided by that particular provider or an opinion based on review of objective testing performed by another mental health provider. As an ALJ may reject an "acceptable medical source's" opinion which is brief, conclusory and inadequately supported by objective medical evidence, *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004), this is a proper reason to reject the DSHS "other source" evaluations. Because substantial evidence supports the ALJ's rejection of the DSHS evaluations, the ALJ did not err.

As to Plaintiff's contention the ALJ improperly denied the DSHS evaluations the "great deference" deserved by opinions from treating

1 sources, only medical opinions from treating "acceptable medical
2 sources" are deserving of "controlling weight." SSR 96-2. While
3 the factors of 20 C.F.R. §§ 404.1527(d) and 416.927(d) may lead to
4 a conclusion that an "other source" is deserving of greater weight
5 than an "acceptable medical source," only treating source medical
6 opinions can be given "controlling" weight and only "acceptable
7 medical sources" may give "medical opinions." 20 C.F.R. §§
8 404.1527(a)(2), 416.927(a)(2); SSR 06-03p; SSR 96-2p. As a result,
9 there is no error in the ALJ's failure to accord greater deference
10 to Plaintiff's treating "other source" opinions as Plaintiff
11 alleges. As discussed above, the ALJ's decision to reject the DSHS
12 evaluations was based on proper reasons supported by substantial
13 evidence and therefore, the ALJ did not err.

14 **C. Step Four**

15 Plaintiff argues "the ALJ failed to make the requisite findings
16 at each phase of step four." (ECF No. 15 at 18.) At step four of
17 the sequential evaluation process, claimant must establish that his
18 severe impairment or combination of impairments prevent him from
19 doing his PRW. *Pinto v. Massanari*, 249 F.3d 840, 844 (9th Cir.
20 2001). SSR 82-62 states,

21 In finding that an individual has the capacity to
22 perform a past relevant job, the determination or decision
must contain among the findings the following specific
findings of fact:

- 23 1. A finding of fact as to the individual's RFC
- 24 2. A finding of fact as to the physical and mental
25 demands of the past job/occupation.
- 26 3. A finding of fact that the individual's RFC would
27 permit a return to his or her past job or occupation.

28 See also *Pinto*, 249 F.3d at 844-45. While Plaintiff continues to

1 carry the burden at step four, as the 10th Circuit has recognized,
2 there is "tension created when the mandate of SSR 82-62 is
3 transposed on claimant's step four burden of proof." *Henrie v. U.S.*
4 *Dept. Of Health & Human Serv.*, 13 F.3d 359, 361 (10th Cir. 1993)
5 (finding "the ALJ's duty is one of inquiry and factual development
6 [while] the claimant continues to bear the ultimate burden of
7 proving disability"). Evidence of the physical and mental demands
8 of a particular job is found primarily in statements and vocational
9 documentation by the claimant in the record; with supplementary
10 information from the *Dictionary of Occupational Titles (DICOT)*,
11 other administratively recognized publications, or vocational expert
12 testimony. SSR 82-61, 82-62.

13 Under 20 C.F.R. §§ 404.1520(e) and 416.920(e), "a claimant will
14 be found to be 'not disabled' when it is determined that he . . .
15 retains the RFC to perform: (1) The actual functional demands and
16 job duties of a particular past relevant job; or (2) The functional
17 demands and job duties of the occupation as generally required by
18 employers throughout the national economy." SSR 82-61; see also
19 *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (at step four,
20 the ALJ must determine if a claimant is "able to perform [his] past
21 relevant work either as actually performed or as generally performed
22 in the national economy").

23 Plaintiff specifically argues the ALJ erred by (1) not
24 including all of Plaintiff's limitations in his RFC,³ (2) failing to
25

26 ³ In a footnote, Plaintiff states, "Despite acknowledging that
27 the claimant suffers from morbid obesity, the ALJ failed to consider
28 this impairment in combination with the claimant's other impairments

1 make findings regarding the specific demands of Plaintiff's PRW, and
2 (3) failing to compare the specific demands of Plaintiff's PRW with
3 his specific functional limitations. (ECF No. 15 at 18.) As to
4 Plaintiff's first argument, the ALJ's hypothetical need only include
5 those limitations which the ALJ finds credible. *Magallanes v. Bowen*
6 881 F.2d 747, 756-57 (9th Cir. 1989). Because limitations alleged
7 both by Plaintiff and Plaintiff's treating mental health counselors
8 were properly rejected as discussed above, the ALJ did not err by
9 excluding these rejected limitations in the hypothetical posed to
10 the VE.

11 As to Plaintiff's argument the ALJ failed to make findings as
12 to the demands of Plaintiff's PRW, this information is in the
13 record, including testimony elicited from Plaintiff and the VE.
14 During the hearing, the Plaintiff's attorney asked Plaintiff
15 questions in response to requests for information identified by the
16 VE at the opening of the hearing. (Tr. 25.) Plaintiff testified

17
18 as required by SSR 02-1p. In fact, after noting that it constituted
19 a severe impairment, the ALJ essentially ignored it completely."
20 (ECF No. 15 at 17, n.1; ECF No. 18 at 7, n.1.) This statement fails
21 to show how any error has prejudiced Plaintiff. *Burch*, 400 F.3d at
22 681-83. Plaintiff also does not argue his obesity exacerbates his
23 other impairments. *Id.* The court does not address this issue
24 because Plaintiff does not argue with specificity. *Carmickle v.*
25 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008).
26 Further, the hearing transcript shows the ALJ limited Plaintiff to
27 a light level of work based at least in part on Plaintiff's obesity.
28 (Tr. 37.)

1 his work as a computer specialist/operator was "in the backroom
2 working on computers . . . without a lot of client or public
3 contact." (*Id.*) In addition, Plaintiff provided written
4 information as to the physical demands of his PRW as a computer
5 operator. (Tr. 107-08.) The ALJ's step four finding that
6 Plaintiff's past work "does not require the performance of work-
7 related activities precluded by [his] residual functional capacity,"
8 is supported by substantial evidence in the record. Even assuming
9 the step four findings lacked the specificity contemplated by SSR
10 82-62, any error is harmless because the remand for correction of
11 the error would not change the outcome. *Stout*, 454 F.3d at 1055;
12 see also, *Shinseki v. Sanders*, 129 S.Ct. 1696, 1706 (2009) (burden
13 of showing error falls with claimant.)

14 As to findings regarding Plaintiff's PRW as generally found in
15 the national economy, the ALJ made no specific finding on that
16 matter. However, there is no error because the ALJ met his burden
17 by finding Plaintiff can do his PRW as actually performed. *Lewis v.*
18 *Barnhart*, 281 F.3d at 1083. Because the record includes information
19 as to the demands of Plaintiff's PRW and the ALJ made findings as to
20 how Plaintiff's PRW was actually performed, the ALJ's decision
21 Plaintiff could return to his PRW as a computer specialist/operator
22 is not erroneous.

23 In sum, the ALJ did not err in finding Plaintiff not credible,
24 in his evaluation of medical opinion evidence or at step four. The
25 ALJ's decision is supported by substantial evidence and is without
26 legal error. Accordingly,

27 **IT IS ORDERED:**

28 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is

1 **DENIED;**

2 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is

3 **GRANTED;**

4 The District Court Executive is directed to file this Order and
5 provide a copy to counsel for Plaintiff and Defendant. The file
6 shall be closed and judgment entered for Defendant.

7 DATED November 23, 2011.

8
9 S/ CYNTHIA IMBROGNO
10 UNITED STATES MAGISTRATE JUDGE
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